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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

A.J. ACOSTA COMPANY, INC.,

Plaintiff, Cross-defendant and Appellant,

v.

COUNTY OF SAN BERNARDINO,

Defendant, Cross-complainant and Appellant;

THE PEOPLE OF THE STATE OF CALIFORNIA,

Cross-complainant and Appellant;

JOAQUIN ANDRES ACOSTA,

Cross-defendant and Appellant.

E056556

(Super.Ct.No. CIVSS803651)

OPINION

APPEAL from the Superior Court of San Bernardino County. David S. Cohn, Judge. Affirmed.

Boudreau Williams and Jon R. Williams; Calegari Law Corporation and Kenneth T. Calegari for Plaintiff, Cross-defendant and Appellant and for Cross-defendant and Appellant.

Jean-Rene Basle, County Counsel, and Matthew J. Marnell, Deputy County Counsel, for Defendant, Cross-complainant and Appellant and for Cross-defendant and Appellant.

A.J. Acosta Company, Inc. filed this action against the County of San Bernardino, seeking damages based on promissory estoppel.

The County of San Bernardino, plus the People of the State of California (collectively the County), then filed a cross-complaint against A.J. Acosta Company, Inc., plus Joaquin Andres Acosta (collectively Acosta). The County asserted various causes of action arising out of alleged zoning violations affecting a piece of property owned and/or operated by Acosta.

At the end of a bench trial, the trial court rendered a tentative decision. In it, the trial court found that the property was in violation of zoning ordinances. It ordered Acosta to clean up the property. It also imposed a fine of $721,000 for past violations. However, to ensure compliance with its clean-up order, it conditionally stayed the fine. Thus, it ordered that, if Acosta cleaned up the property within 60 days, it would have to pay only $15,000 of the fine; if within 120 days, only $240,333; and if within 240 days, only $480,666. It would not have to pay the full $721,000 unless it failed to clean up the property within 360 days. Acosta requested a statement of decision. Nearly three months

later, the trial court rendered a statement of decision, and it entered judgment to the same effect as its tentative decision.

Acosta has appealed, contending:

1. The trial court erred by making its tentative decision effective immediately, before entry of judgment.

2. The trial court's fine structure is unduly punitive, in violation of due process.

The County has cross-appealed.

We find no reversible error. Hence, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

As mentioned, the operative complaint asserted a single cause of action for promissory estoppel.

The County's cross-complaint asserted causes of action for zoning code violations, public nuisance, violation of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.), declaratory relief, indemnity, and contribution.

On February 10, 2012, after a bench trial, the trial court announced its tentative decision.

The trial court denied relief on the complaint. On the cross-complaint, it found no violation of the UCL. However, it did find "serious and substantial violation[s]" of zoning ordinances.

Thus, it granted "injunctive relief." (Capitalization altered.) It ordered, "[T]here will be no businesses run from the property until appropriately permitted after compliance is achieved." (Capitalization altered.) It also ordered Acosta to remove everything from the property, including equipment, vehicles, and debris, leaving the property a vacant lot.

The trial court imposed a fine "today" of $500 per day for 1,442 days (i.e., from March 1, 2008 through the date of its tentative opinion), for a total of $721,000.[1] However, it stayed the fine and ordered it paid in three phases. In each phase, $15,000 would be due within 60 days after the beginning of the phase. If the property was in full compliance within 120 days after the beginning of the phase, then the remainder of the fine would be stayed.[2] If the property was not in full compliance within 120 days, then $225,333 (representing one-third of the total fine, minus $15,000) would become due immediately, and any next phase would go into effect. It explained, "[the] goal is to bring the property into compliance, not to put Mr[.] Acosta out of business . . . ." (Capitalization altered.)

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[1] The fine was authorized under section 86.09.100(b) of the San Bernardino County Code, which, as relevant here, provides: "Any person . . . who violates any provision of this Development Code or any permit or any condition of land use approval granted pursuant thereto, shall be liable for a civil penalty not to exceed $1,000.00 per violation for each day or any portion thereof[] that the violation continues to exist."

[2] If the property did not remain in compliance for five years, the stay could be vacated.

The trial court made it clear that the first phase started on the day it announced its tentative decision: "It will be 120 days from today's date, so even if, by the time I sign the judgment, it's less than 120 days, then you have got less than 120 days. June 8th is the deadline . . . , irrespective of when I actually sign the judgment."

On February 21, 2012, Acosta requested a statement of decision. On March 1, 2012, however, without having issued a statement of decision, the trial court entered judgment in conformity with its tentative decision.

On April 3, 2012, Acosta brought an ex parte application to set aside the judgment, on grounds including that the trial court had not yet issued a statement of decision. The trial court granted the application and set aside the judgment.

On April 12, 2012, the County filed a proposed statement of decision. On April 25, 2012, Acosta filed objections to the proposed statement of decision.

On May 2, 2012, the trial court entered a final statement of decision and entered a new judgment, which was, once again, in conformity with its tentative decision. Acosta appealed and the County cross-appealed.

On October 22, 2012,[3] the trial court entered a stipulated order amending the "compliance deadline[s]" set in the judgment as follows:

Phase I: May 31, 2013

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[3] We discuss this postjudgment development solely because it is relevant to mootness (see part II, *post*). (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405; *In re Salvador M.* (2005) 133 Cal.App.4th 1415, 1421-1422.)

Phase II: September 27, 2013

Phase III: December 27, 2013.

It was agreed that, by stipulating to the order, Acosta did not forfeit its right to appeal.

II

THE ISSUANCE OF ORDERS EFFECTIVE BEFORE ENTRY OF JUDGMENT

After a trial court announces a tentative decision, either party may request a statement of decision. The request must specify the principal controverted issues. (Code Civ. Proc., § 632; Cal. Rules of Court, rule 3.1590(d).) In response, the trial court must prepare a proposed statement of decision. (Cal. Rules of Court, rule 3.1590(f).) Any party may object to the proposed statement of decision. (Cal. Rules of Court, rule 3.1590(g).) The trial court then must file the final statement of decision (Code Civ. Proc., § 632), which may be the same as the proposed statement of decision (if the objections have been overruled) or an amended version of proposed statement of decision (if one or more objections have been sustained).

"[A] tentative decision does not constitute a judgment and is not binding on the court." (Cal. Rules of Court, rule 3.1590(b).) "Until a judgment is entered, it is not effectual for any purpose, [citation], and at any time before it is entered, the court may change its conclusions of law and enter a judgment different from that first announced. [Citations.]" (*Phillips v. Phillips* (1953) 41 Cal.2d 869, 874.) "One of the purposes of Code of Civil Procedure section 632 is to gain input by counsel into the preparation of the

statement of decision and to cause the preparation of a statement of findings which covers all issues." (*In re Marriage of Jones* (1990) 222 Cal.App.3d 505, 515.)

Acosta therefore argues that the trial court could not issue immediately effective orders as part of its tentative decision, or indeed at any time before judgment.

The County responds that the asserted error is moot. We agree. "[A]n appeal is moot if '"the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief."' [Citation.]" (*Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 175.) Here, Acosta has never been accused of violating the injunction between February 10, when the trial court issued its tentative opinion, and May 2, when it entered the judgment.[4]

Acosta asserts that it was prejudiced because it was already "out of compliance" with the judgment — and thus subject to "escalating fines" — when the judgment was entered. Quite frankly, we have no idea what it is talking about. Phase I was not set to end until June 11, which was well after May 2, when the judgment was entered. And, as noted, it was eventually extended to May 31, 2013. Admittedly, the first $15,000 payment was due before the judgment was entered; the record, however, does not indicate when (or even whether) it was actually paid.

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[4] The County did ask the trial court to hold Acosta in contempt, but based solely (as far as the record shows) on events in June 2012, after the judgment had already been entered. Moreover, according to Acosta, contempt was denied.

Acosta claims that the contempt request was based at least partly on its failure to pay the first $15,000. The cited portion of the record fails to support this.

The trial court's calculation of the $721,000 fine was entirely retrospective; it was based on a finding that the property had been out of compliance from March 1, 2008 through February 10, 2012. Acosta seems to suggest that the trial court was going to impose *additional* fines of $500 a day if the property *remained* out of compliance after February 10 (or May 2). However, that would be completely contrary to the judgment.

Arguably, Acosta was prejudiced in two respects: (1) It was required to pay the first $15,000 within 60 days after February 10, instead of 60 days after May 2; and (2) it could not use the property for business purposes between February 10 and May 2. Even if so, however, at this point, we cannot give it any effective appellate remedy for any such prejudice.

We also note that ultimately, Acosta had far more than 120 days to complete a cleanup during Phase I. According to the tentative decision, Phase I was supposed to run for 120 days, i.e., from February 10 through June 11. On May 2, the trial court entered the judgment. On October 22, the trial court extended Phase I to May 31, 2013. Thus, Acosta actually enjoyed a Phase I that lasted 394 days — over a year.

Acosta also asserts that "the 'phased' fine structure the trial court fashioned . . . was impermissibly based upon conduct which occurred before th[e] [j]udgment was entered . . . ." It does not explain, however, why this is "impermissibl[e]." The trial court could have simply entered judgment for a fine of $721,000. Instead, it chose to forgive portions of that fine, conditionally, to induce Acosta to clean up the property. In the end, then, any fine that actually becomes payable will be based partly on past conduct

and partly on future conduct. We are not convinced that there is anything wrong with that. But even assuming there is, it seems completely unrelated to whether the trial court erred by making its orders effective on February 10 instead of May 2.

Separately and alternatively, even absent mootness, we do not agree that the trial court erred. It had express statutory authority to grant a preliminary injunction "at any time before judgment . . . ." (Code Civ. Proc., § 527, subd. (a).)

Acosta argues that what the trial court issued was a permanent injunction, not a preliminary injunction. First, it asserts that the injunction effected a final resolution of the parties' claims. However, it cannot have it both ways; if indeed the trial court had yet to issue a statement of decision and to enter judgment, then the injunction that it did issue was, by definition, preliminary. The fact that it was phrased in such a way as to remain in effect even after the entry of judgment is of no moment, because the trial court still could have decided to modify it or to dissolve it at any time.

Next, Acosta argues that the trial court did not apply the correct legal standard for a preliminary injunction, which would have required it to consider both "(1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) However, it cannot show that the trial court did not, in fact, consider the relative balance of harms. "'The most fundamental rule of appellate review is that a judgment is presumed correct, all intendments and presumptions are indulged in its favor, and ambiguities are resolved in favor of

affirmance.' [Citation.] 'It is a basic presumption indulged in by reviewing courts that the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties.' [Citation.]" (*Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 741.) There is nothing in the record to rebut this presumption.

In any event, "[t]he trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. [Citation.]" (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.) Here, after a full trial and after a tentative decision in favor of the County, the potential-merit factor had about as much weight as it possibly could; hence, the interim-harm factor had about as little weight as it possibly could. The trial court could reasonably conclude that the County was entitled to immediate relief while the statement of decision process played out.

Acosta also argues that "there was no possible way for [it] to stay execution while the merits of [the] appeal are reviewed by this court. Indeed, would that bond be against the first $15,000.00 in fines identified by the trial court? Or the $225,333.00 in fines imposed by the trial court in the next phase of its fine structure? Or the full fine amount of $721,000.00, which is so exorbitant on its face that no small business like Acosta could reasonably be asked to securitize such a bond without going out of business?" (Italics omitted.)

First and foremost, *this argument has nothing to do with whether the trial court could enter an injunction before judgment*. Even if the trial court had made its injunction effective only after entry of judgment, Acosta would still be making the same argument about its inability to obtain a bond.

Second, if there were any genuine uncertainty, Acosta could have filed a motion in the trial court to fix the amount of the bond. (See *Leung v. Verdugo Hills Hosp.* (2008) 168 Cal.App.4th 205, 211-217.) We express no opinion as to what the appropriate amount might be.[5] Even if the trial court required Acosta to post a bond based on the entire $721,000 fine, the fact (or alleged fact) that Acosta could not afford to do so would be irrelevant. The law does not guarantee that an appeal bond will be either available or affordable.

We therefore conclude that the fact that the trial court's tentative decision included orders that were effective before entry of judgment was not reversible error.

III

THE FINE STRUCTURE AS A VIOLATION OF DUE PROCESS

Acosta contends that the fine, as structured by the trial court, violates due process.

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[5] Indeed, we express no opinion as to whether the judgment could be stayed by posting a bond at all. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2014) ¶ 7.131, p. 7-44 ["CCP § 917.1 does not apply to a money judgment that is *ancillary* or *incidental* to the main provisions of the judgment"]; see also Code Civ. Proc., § 917.8, subd. (c).)

Acosta relies on *Hale v. Morgan* (1978) 22 Cal.3d 388. *Hale* involved Civil Code section 789.3, which (as it then stood) "assesse[d] a penalty of $100 per day against a landlord who willfully deprives his tenant of utility services for the purpose of evicting the tenant." (*Hale*, *supra*, at p. 392.)

The Supreme Court noted the following aspects of the statutory penalty: (1) "[n]o discretion is permitted the trier of fact in fixing the penalty"; (2) "the duration of the penalties is potentially unlimited"; (3) "[t]he acts prohibited by the section potentially encompass a broad range of culpable . . . conduct on the part of the landlord, and a widely divergent injury . . . to the tenant"; (4) "[t]he fixed penalties are imposed upon potential defendants who may vary greatly in sophistication and financial strength" (*Hale v. Morgan*, *supra*, 22 Cal.3d at p. 399); and (5) "the sanction imposed . . . is potentially more severe than that provided by the Legislature for other more serious transgressions by the landlord against the tenant" (*id.* at p. 400). It concluded, "[f]or all of the foregoing reasons in combination, . . . that section 789.3 *may* . . . produce constitutionally excessive penalties." (*Id.* at p. 404, italics added.)

The court immediately cautioned: "We cannot conclude, however, that all applications of section 789.3's penalty formula would be unconstitutional." (*Hale v. Morgan*, *supra*, 22 Cal.3d at p. 404.) "Where, as here, a penal statute may be subject to both constitutional and unconstitutional applications, courts evaluate the propriety of the sanction on a case-by-case basis." (*Id.* at p. 404.)

In the case before it, the court observed, the "facts suggest[ed] a modest operation by a relatively unsophisticated landlord." (*Hale v. Morgan, supra,* 22 Cal.3d at p. 405.) The tenant had committed a trespass by sneaking his mobile home into the landlord's trailer park, though he had subsequently entered into a lease; moreover, the tenant had then breached the lease by failing to pay rent. (*Id*. at p. 405; see also *id*. at p. 393.) The fine due ($17,300) was grossly disproportionate to the rent ($780 a year). (*Id*. at p. 405.) Thus, the tenant could "well end up owning the park or a substantial equity therein as a consequence of the application of section 789.3 to [the landlord's] conduct." (*Ibid*.) The court concluded, "Such a confiscatory result is wholly disproportionate to any discernible and legitimate legislative goal, and is so clearly unfair that it cannot be sustained." (*Ibid*.)

The factors that led the court in *Hale* to conclude that the statute there could *possibly* produce constitutionally excessive penalties were not present here. Under the statute in *Hale*, a fixed penalty of $100 a day was mandatory; under the county ordinance at issue here, the trial court had discretion to set a fine of anywhere from a fraction of a cent up to $1,000 a day. Thus, it was able to tailor the fine to Acosta's culpable conduct and to the County's resulting injury, as well as to their respective "sophistication," "strength," and any other relevant factors. Admittedly, in both cases, the number of days on which the penalty is based is limited only by the duration of the violation; however, here, if the duration is long, the trial court can calibrate the fine by reducing the amount per day.

Even if all the same factors were present here, the fine would not necessarily be unconstitutional; under *Hale*, we would still have to determine whether it was unconstitutional as applied. Acosta argues that the fine "may" result in confiscation of its property; however, it cites no *evidence in the record* supporting this claim. Similarly, it argues that it "likely" could not bring the property into compliance before the end of Phase III, so that the full $721,000 fine would be due, but it cites no *evidence* of this. "We may disregard a [party]'s statements of fact when those statements are unsupported by citations to the record. [Citation.] And we will not scour the record on our own in search of supporting evidence. [Citation.] Where, as here, [parties] have failed to cite that evidence, they cannot complain when we find their arguments unpersuasive. [Citation.]" (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1149.)

Acosta's whole argument, then, reduces to a claim that it is unconstitutional to impose a fine on a per-day basis under any circumstances. *Hale* did say, "[W]e have looked with disfavor on ever-mounting penalties and have narrowly construed the statutes which either require or permit them." (*Hale v. Morgan*, *supra*, 22 Cal.3d at p. 401.) However, it did not hold that they are necessarily unconstitutional; quite the contrary, it held that they must be examined on a case-by-case basis.

In sum, then, Acosta has failed to demonstrate that the fine as structured by the trial court violated due process.

IV

THE COUNTY'S CROSS-APPEAL

As mentioned, the County filed a notice of cross-appeal. Hence, it ought to have filed a combined respondent's brief and appellant's opening brief. (Cal. Rules of Court, rule 8.216(b)(1).) The County's initial brief, however, appeared to be purely a respondent's brief.

Later, after Acosta filed its reply brief, the County filed a motion to be relieved of any abandonment of its cross-appeal. It assured us that it had "pursue[d] the cross-appeal . . . by the content of the arguments within the Respondent's Brief, asking for reversal upon those grounds." "[T]he arguments . . . in support of any cross-appeal are totally contained within 'Respondent's Brief' . . . ." "All its arguments that these parties believe are necessary are within its [*sic*] 'Respondent's Brief' already on file with the court."

We accepted the County's representation that its respondent's brief contained all of the arguments that it wanted to make as an appellant. Thus, we denied the motion, "as unnecessary," and we granted the County an extension of time to file its reply brief.

Now, however, having read the County's respondent's brief in its entirety, we cannot find a single claim of error in it.

Every brief — whether an appellant's brief or a respondent's brief — must "[s]tate each point under a separate heading or subheading summarizing the point . . . ." (Cal. Rules of Court, rule 8.204(a)(1)(B).) All of the County's headings assert some reason or other why Acosta's appeal should be denied and the judgment should be affirmed.

Indeed, the very last words in the County's respondent's brief are: "Therefore, no part of the trial court's decision should be reversed."

The County's notice of cross-appeal did not have to state any grounds for the cross-appeal. (See Cal. Rules of Court, rule 8.100(a), (f).) Nevertheless, it gratuitously stated that the County intended to argue that the trial court erred by refusing to impose any penalties under the UCL. Moreover, one of the headings in the respondent's brief does state, "The existence of contract rights would not deter an Unfair Competition Act injunction." (Capitalization altered.) Under that heading, however, the County merely argues that we should reject Acosta's claim that the judgment violates its contract rights because the trial court could have granted identical relief under the UCL. It does not argue that the judgment should be reversed or modified.

Any issue not raised in an appellant's opening brief is deemed forfeited. (*In re Marriage of Lamoure* (2011) 198 Cal.App.4th 807, 817 [Fourth Dist., Div. Two].) If only out of an excess of caution, however, we have reviewed the County's reply brief. There, the County does specifically argue — for the first time — that the trial court erred by finding no violation of the UCL. Even so, the County appears to be arguing merely that the UCL is an alternative basis for upholding the judgment.[6] It says that "the decision of the trial court should be reversed," but only "insofar as" it declined to rely on

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[6] For example, the County states that a $721,000 fine would have been "appropriate" under the UCL. It also states that "the UC[L] was certainly a basis to have at least imposed such combination of injunction with the potential of future penalties for violation of the injunction . . . ."

the UCL as the basis for an injunction and a fine. It does not explain how an injunction and a fine based on the UCL would be any different from the injunction and the fine that the trial court did order.

We therefore conclude that the County has abandoned its cross-appeal. Moreover, even if we were to consider the County's belated contention that the trial court erred by refusing to rely on the UCL, the County has not shown prejudice.

V

DISPOSITION

The judgment is affirmed. The County is awarded costs on appeal against Acosta.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.